PLANNING THE WIFE'S ESTATE

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Thus far we have been concerned only with Mr. Beaver's estate planning problems. Since Mrs. Beaver does not now own an appreciable amount of the property, it might appear that there is no need to give consideration now to the problems involving her estate; these can be considered in the future, when and if she receives a part of Mr. Beaver's property at his death. There are several reasons, however, why Mrs. Beaver's immediate estate planning problems should not be ignored.

At the present time Mrs. Beaver owns outright property valued at $12,000 and a joint interest with Earl in additional property valued at $60,000. If she were to die before Mr. Beaver, there would be no federal estate tax payable regardless of whether the property she owned passed to Mr. Beaver or to the children. If her will remains unchanged, and if the joint and survivorship form of ownership is continued, however, Mrs. Beaver's prior death would result in an increase in Mr. Beaver's gross estate. Since he would not have the advantage of a marital deduction at his subsequent death, the additional estate tax liability for his estate could consume a sizeable part of the property he inherits from Mrs. Beaver. From a tax standpoint, therefore, it is disadvantageous for Mrs. Beaver to leave any of her property to her husband outright. There are, of course, many non-tax reasons why a wife might be well advised to leave her property outright to her husband, even though this may result in a potentially larger estate tax upon his subsequent death. From a family standpoint, it is often necessary to devise the family residence to the husband; and it is often inadvisable to leave even a small amount of property to the children.

As a result of lifetime gifts now contemplated by Mr. Beaver, it could well be that Mrs. Beaver's estate will soon be of such size that there will be a federal estate tax payable at her death. Where this is the case, a decision must be made as to whether her will should take advantage of the marital deduction. While a decision that Mrs. Beaver should use the marital deduction might well be appropriate, there would never be a tax reason for her to leave property to Mr. Beaver in excess of the amount which will qualify for the deduction. By so doing, she would needlessly subject the excess property to a second estate tax at his death.

A decision to avoid any unnecessary increase in the husband's estate does not necessarily mean that the husband must be deprived of the income from the wife's property after her death. The wife's will could create a trust which provides that the husband will receive the income from the trust property for life. So long as such a trust was properly

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drawn so as to avoid giving the husband any power with respect to the trust property which could be deemed a taxable power of appointment under Section 2041, the property in the trust will not be included in his estate. The availability of the income from the trust property might well make it possible for the husband to make additional gifts after his wife's death, and thereby further reduce his own taxable estate.

Special Problems Pertaining to Insurance on the Husband's Life Owned by the Wife

It will often be advantageous, from an estate tax standpoint, for the wife to own the life insurance on her husband's life. Consideration should be given to the beneficiary designation on such policies, however, to avoid an unexpected gift tax cost at the time of the husband's death, while the wife is still living. If the beneficiary designation names someone other than the wife as beneficiary, and the wife retains the power to change the beneficiary, the death of the husband will result in a completed gift from the wife to the beneficiary of the entire insurance proceeds.[1] This gift tax liability would be avoided if the proceeds were payable to the wife, who is the owner of the policy. While this will mean that the proceeds will be in her gross estate at her subsequent death, the wife may have the opportunity to make periodic gifts, after her husband's death, and thus remove them from her estate and at the same time gain the advantage of the annual gift tax exclusion.

This same potential gift tax liability at the husband's death exists to a lesser extent if a policy on the husband's life designates the wife as the primary beneficiary under an installment option, with the children designated as secondary beneficiaries. At the husband's death this designation becomes irrevocable and a completed gift is made by the wife to the children of the value of their secondary interest under the policy. Since this is a future interest, no annual exclusion is available to the wife.

When the wife owns the insurance policy, it will, of course, be included in her gross estate, upon her death prior to that of the husband. For this purpose, the policy is valued in the same way as it would be for gift tax purposes.[2] Attention must be given to the provisions made for ownership of the policy after her death, in the event she predeceases her husband. If the policy is permitted to pass to the husband in that event, the estate tax benefits which prompted the original transfer of the policy to the wife will be lost. The creation of an insurance trust under the wife's will is one way to handle this problem.

If the husband is one of the trustees of such a trust, however, and if he, either alone or in conjunction with a co-trustee, can exercise any of the ownership rights in the policy, his death during the period he is

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[1] *Cf.* Goodman v. Commissioner, 4 T.C. 191 (1944), *aff'd,* 156 F.2d 218 (2d Cir. 1946).

[2] Dupont's Estate v. Commissioner, 233 F.2d 210 (3d Cir. 1956); Rev. Reg. § 20.2031-8.

serving as trustee would result in the insurance proceeds being included in his estate.[3] This result can be avoided if the wife's will provides that the ownership rights shall be exercisable only by the trustee other than her husband.

This same unfortunate result could occur if the husband is named executor of his wife's estate, and if he should die while holding the ownership rights in a policy on his own life, even though such rights are held by him in his capacity as executor. Provision for a co-executor with the sole right to act with respect to the insurance would eliminate this possibility, but since the possibility of the husband's death during administration of the wife's estate is usually remote, the risk involved in omitting special provisions of this sort may well be justified.

Consideration must also be given to the source of premium payments after the wife's death, if she predeceases the husband. If the insurance is to be held in a trust, the interests of the beneficiaries under the trust will usually be future interests and payment of premiums upon policies held in such a trust will be gifts of future interests, and will not qualify for the annual exclusion.[4] This suggests the advisability, wherever possible, of placing sufficient property in the insurance trust to provide for premium payments.

To summarize briefly respecting the planning of the wife's estate:

1. Planning for the disposition of the wife's estate is an essential part of any family estate planning undertaking, regardless of whether or not the wife presently owns a substantial amount of property.

2. Ownership by the wife of insurance policies on the husband's life, while a useful estate planning device, requires that consideration be given to the beneficiary designation in the policies and to the disposition which is to be made of the policies in the event of the wife's death prior to that of the husband.

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[3] Rev. Reg. § 20.2042-1(c)(4) makes it clear that an incident of ownership held by the insured, even though held in a fiduciary capacity as trustee of a trust in which he has no beneficial interest, will require inclusion of the insurance proceeds in his gross estate.

[4] *Cf.* Frances P. Bolton, 1 T.C. 717 (1943). If the trust meets the requirements of Section 2503(c), however, the payment of premiums upon policies held in the trust would qualify as gifts of present interest.